Binariang Communications Sdn Bhd v I & P Inderawasih Jaya Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-429 OF 1998

GOPAL SRI RAM, SITI NORMA YAAKOB AND ABU MANSOR JJCA

12 JUNE 2000

Civil Procedure *— Locus standi — Application by owner of building/respondents to injunct defendant from trespassing into common property — Sale of parcels to third parties — Whether possessory rights over common property of building remain with respondents after execution of sale and purchase agreement — Whether respondents had locus standi to apply for injunction against trespassers*

Civil Procedure *— Summary judgment — Application for injunctive relief — Specific provisions in O 29 of the Rules of the High Court 1980 governing application and granting of injunctive relief — Whether injunctive relief can be applied in summary proceedings — Conditions to be fulfiled before granting injunctive relief*

The respondent had constructed a block of three-storey commercial building and had sold subdivided parcels in the building to various purchasers. Pending the issuance of strata titles to the purchasers, the respondent were responsible for the maintenance and management of the building. The respondent discovered that the appellant, a telecommunications company, had erected a cabin equipped with transmission lines on a portion of the roof of the building and had restricted access to the roof by placing iron grills and a locked gate on the stairway leading to the roof, without the respondent's consent. The appellant denied they were trespassers as they contend that they had the permission by way of a tenancy agreement with the purchasers of the three relevant parcels over which the structures were erected. The respondent commenced proceedings under O 14 of the Rules of the High Court 1980 ('the RHC') and judgment in the nature of injunction as well as reliefs for damages were ordered against the appellant. The appellant appealed. It was submitted that: (i) there are specific provisions in O 29 of the RHC governing the application and granting of injunctive relief, thus resort to O 14 proceedings for the same relief was procedurally wrong; and (ii) the respondent had no locus standi to obtain the injunctions since the respondent were not persons in possession of the building and common property.

Held, dismissing the appeal:

(1) Based on authority, as long as three conditions have been fulfilled, there is no restriction in law to prevent a plaintiff from proceeding to obtain injunctive relief in O 14 proceedings before a judge. The three conditions have been identified to be: (i) the defendant have entered appearance; (ii) the statement of claim has been served on the defendant; and (iii) the application for summary judgment must be supported by affidavit. On the facts of the present appeal,

all the conditions had been fulfilled and the application was heard by a judge. Whilst O 29 of the RHC makes provisions for the application and granting of injunctions, that order relates only to the application and issuing of an interlocutory or interim injunction as opposed to one that is final in nature (see p 325F–I).

(2) Reading the interpretations to be given to the property sold, only three units of the shop lots were sold. Clearly the three units do not include any common property and as such it was incorrect for the appellant to say that the respondent had given up possession of the common property with the sale of the three parcels. Since the respondents continued to retain possessory rights over the common property of the building even after the execution of the sale and purchase agreements, they could legally maintain a charge of trespass against the appellant (see p 327D–E).]

[Bahasa Malaysia summary

Responden telah membina sebuah blok bangunan komersial tiga tingkat dan telah menjual bahagian-bahagina bangunan tersebut kepada pelbagai penjual. Sementara menunggu hak milik strata dikeluarkan kepada pembeli, responden bertanggungjawab menyenggara dan menguruskan bangunan tersebut. Responden mendapati bahawa perayu, sebuah syarikat telekomunikasi, telah mendirikan satu kabin yang dilengkapi dengan talian-talian pemancaran pada sebahagian atap bangunan tersebut dan telah menghadkan jalan masuk ke bumbung tersebut dengan memasangkan gril-gril besi dan pagar berkunci pada tangga menuju ke arah bumbung tersebut, tanpa kebenaran responden. Perayu menafikan mereka menceroboh dengan menegaskan bahawa mereka telah memperoleh kebenaran melalui satu perjanjian sewaan dengan pembeli-pembeli daripada tiga bahagian yang relevan di mana struktur tersebut telah didirikan. Responden telah memulakan prosiding di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan penghakiman dalam bentuk injunksi juga relif-relif untuk ganti rugi telah diperintahkan terhadap perayu. Perayu telah membuat rayuan. Adalah dihujahkan bahawa: (i) terdapat peruntukan-peruntukan spesifik KMT yang mengawal permohonan dan kebenaran relif injunksi, oleh itu dengan cara prosiding A 14 bagi relif yang sama adalah prosedur yang salah; dan (ii) responden tidak mempunyai locus standi untuk mendapat injunksi tersebut kerana responden bukanlah orang yang memiliki bangunan dan harta bersama tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Berdasarkan autoriti, asalkan tiga syarat telah dipenuhi, tiada sekatan undang-undang yang menghalang plaintif daripada

prosiding untuk mendapat relif injunksi dalam prosiding A 14 di hadapan hakim. Tiga syarat tersebut yang dikenalpasti adalah: (i) defendan telah memasuki kehadiran; (ii) pernyataan tuntutan tersebut telah disampaikan ke atas defendan; dan (iii) permohonan untuk penghakiman terus mestilah disokong oleh afidavit. Berdasarkan fakta-fakta rayuan ini, semua syarat tersebut telah dipenuhi dan permohonan tersebut telah didengari hakim. Tatkala A 29 KMT memberikan peruntukan untuk permohonan dan pemberian injunksi, perintah tersebut hanya berhubung dengan permohonan dan mengeluarkan satu injunksi interlokutori atau interim dan bukannya dengan suatu yang berbentuk muktamad (lihat ms 325F–I).

(2) Dengan membaca tafsiran-tafsiran yang diberikan untuk harta yang dijual, hanya tiga rumah kedai yang telah dijual. Adalah jelas tiga unit tersebut tidak termasuk harta bersama dan oleh itu adalah tidak betul untuk perayu mengatakan bahawa responden telah melepaskan pemilikan harta bersama tersebut dengan penjualan tiga bahagian tersebut. Memandangkan responden terus mengekalkan hak pemilikan ke atas harta bersama bangunan tersebut walaupun setelah pelaksanaan perjanjian-perjanjian jual beli, mereka boleh secara sah mempertahankan satu caj menceroboh terhadap perayu (lihat ms 327D–E).]

Notes

For cases on locus standi generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3083–3118.

For cases on summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778.

Cases referred to

Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors [1988] 1 MLJ 188 (refd)

Mohamed v Kunji Mohidin [1966] 2 MLJ 24 (refd)

Senik v Hassan & Anor [1963] MLJ 368 (refd)

Shell-Mex & BP Ltd v Manchester Garages Ltd [1971] 1 All ER 841 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 29 r 1(2B)

Strata Titles Act 1985

Street, Drainage and Building Act 1974 s 70

Appeal from: Civil Suit No 22–173 of 1998 (High Court, Pulau Pinang)

JA Yeoh (*Shearn Delamore & Co*) for the appellant.

Zarizana Abdul Aziz (*K Ahmad & Yong*) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): Summary proceedings under O 14 of the Rules of the High Court 1980 ('the Rules'), were successfully pursued by the plaintiff in the court below and judgment in the nature of two forms of injunction (one mandatory and the other prohibitive) as well as reliefs for damages to be assessed and costs to be taxed were ordered against the defendant. It was to appeal against these orders that the defendant are now cited as the appellant in this appeal before us.

The factual background of this appeal is in no way disputed. The respondent are housing developers and between 1989 to 1993, they were developing their property, Lots 1997 to Lots 2021, Bandar Perai, Seberang Perai Tengah, Penang, held under Qualified Titles No HS (D) 1307 to HS (D) 1331, with the construction of a block of three-storey commercial building known as Taman Inderawasih, Phase 3 C1, consisting of 41 units of shop and office space and had sold subdivided parcels in the said building to various purchasers. Pending the issuance of strata titles to the said purchasers, the respondent were responsible for the maintenance and management of the building. With that in mind, they had, on 1 January, 1993, appointed a real estate agent, Messrs. Jurunilai Bersekutu ('the Property Manager') to manage the common property of the said building but payment of their service charges were made by the owners of the individual parcels, pending the establishment of a management corporation under the Strata Titles Act 1985.

In early December 1997, the Property Manager discovered that the appellant, a telecommunications company, had erected a cabin equipped with transmission lines to serve as a broadcasting station on a portion of the roof of the building and had restricted access to the roof by placing iron grills and a locked gate on the stairway leading to the roof, without the respondent's consent. The appellant admitted this was so but they denied they were trespassers as they contend that they had the permission by way of a tenancy agreement with two brothers, purchasers of the three relevant parcels over which the structures were erected upon payment of a rental of RM2,300 per month to the said purchasers. That being their stand the appellant refused to abide with the respondent's written demand contained in their solicitors' letter dated 19 February 1998, to remove the structures or to cease further acts of trespass on the respondent's property. This led to the respondent filing a writ action on 26 March 1988, seeking reliefs that have since been embodied in the judgment obtained in the O 14 proceedings that I have stated earlier.

For completeness, I need to mention that the mandatory injunction directs the appellant to dismantle and remove all the structures and appurtenances that they had installed on the roof of the respondent's building within seven days of the date of the order. The restraining order prohibits the appellant from further acts of trespass into the respondent's property and the compensatory relief ordered to be assessed was the damages sustained by the respondent as a result of the presence of the illegal structures.

A I also need to point out that before the O 14 proceedings were commenced in the court below, the respondent had, following the filing of their writ action, applied for the same reliefs as sought for in the O 14 proceedings. However they managed to obtain an interim injunction compelling the appellant to remove the iron grills blocking the stairway to the roof, as the same judge who heard the O 14 proceedings, directed the B matter of the removal of the structures on the roof be given an early date for trial. However just days before the trial date, the respondent filed the O 14 proceedings and before us, two issues were raised by the appellant one procedural and the other on a point of law based on the factual matrix of the case.

C The procedural point raises the issue as to whether injunctive relief can be obtained by way of O 14 proceedings. The appellant maintain that since there are specific provisions in O 29 of the Rules governing the application and granting of injunctive relief, resort to O 14 proceedings for the same relief is procedurally wrong.

D For starters, I need to point out that the procedural point was never argued in the court below and on this omission alone, an appellate court is not bound to hear the appellant on their objection, unless due notice had been given and the respondent placed no strong objection to it being raised for the first time. In this instance the respondent raised no objection and under those circumstances we allowed the parties to make their respective E submissions.

That same issue was raised in the case of *Shell-Mex & BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841, where the English Court of Appeal held that it was perfectly proper for a plaintiff to ask for an injunction in summary proceedings under O 14 provided such an application was made to a judge and not to the Master as the latter had no F jurisdiction to issue any injunctive relief. That decision was followed by Zakaria J (as he then was) in *Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188, where he elaborated that as long as three conditions have been fulfilled, there is no restriction in law to prevent a plaintiff from proceeding to obtain injunctive relief in O 14 proceedings before a judge. Those three conditions have been G identified to be:

(1) the defendant had entered appearance,

(2) the statement of claim has been served on the defendant and

(3) the application for summary judgment must be supported by affidavit.

H On the facts of the appeal before us, all the above conditions have been fulfilled and the application was heard by Wan Ismail J (as he then was).

Whilst I appreciate that O 29 of the Rules makes provisions for the application and granting of injunctions, it must be remembered that that order relates only to the application and issuing of an interlocutory or I interim injunction as opposed to one that is final in nature. This is clearly demonstrated by the fact that in the earlier proceedings for the same reliefs, the High Court had granted an interim injunction to the respondent

directing the appellant to remove the iron grills but reserved the determination of the mandatory injunction to remove all the structures above the roof and at the stairway to be heard viva voce at an early date of trial. Another example that shows O 29 is only intended for the issue of a interlocutory or interim injunction is to be found in r 1(2B) of the same order, where an interim injunction granted, ex parte, automatically lapses two weeks after it is granted unless renewed. Under these circumstances I say that the appellant's first objection fails for lack of merit.

I now come to the appellant's more substantial objection that the respondent has no locus standi to obtain the injunctions on the grounds:

(1) that since the respondent had pleaded trespass, that cause of action, can only be maintained by persons in possession and since the respondent are not persons in possession, of the building and common property they have no legal standing to prosecute the appellant. For the same reason indefeasibility of title does not confer a right to the respondent to institute proceedings in trespass.

(2) that they had instituted the present proceedings as the registered proprietors of the land on which strata titles had yet to be issued to purchasers of the parcels in the building and not on behalf of the purchasers, the actual persons in possession of the building.

(3) that the obligation on the part of the respondent to provide services in the maintenance and management of the common property does not confer ownership of the common property to the respondent as they are not in possession of the common property.

It is not disputed that the structures were installed and erected on the common property of the building which the respondent say were not in the original plans that were approved by the authorities. The respondent fear that the presence of the illegal structures would stand in the way of the authorities issuing strata titles to the purchasers of the individual parcels. That fear was not without any basis as the Majlis Perbandaran Seberang Perai had issued a stop work notice dated 30 April 1998, addressed to one of the purchasers informing him that he had breached s 70 of the Street, Drainage and Building Act 1974, for installing the structures without the Majlis Perbandaran's written consent. In this respect, we consider this notice does not provide the determining factor as to the real issue at hand.

That issue is whether the respondent had possession of the common property as to entitle them to prefer a charge of trespass against the appellant. 'Trespass is essentially an injury to possessory right. A person in possession has certain rights under the law as against a trespasser.' So held Abdul Aziz, J in the case of *Mohamed v Kunji Mohidin* [1966] 2 MLJ 24. See also the case of *Senik v Hassan & Anor* [1963] MLJ 368.

The question to ask in this appeal is who had possessory rights of the common property of the building at the material time. Under the sale and purchase agreement dated 29 January 1992, the appellant maintain that the purchasers who purchased the three individual parcels, not only purchased such parcels but also the common property as well. As such any allegation

that they are trespassers cannot come from the respondent as the latter had given up their possessory rights over the common property after the execution of the sale and purchase agreement.

This brings me to the question as to what was sold under the sale and purchase agreement. The preamble to the agreement states the property sold to be the three parcels with vacant possession and these have been identified as Parcel Nos D-G-1, D-1-1 and D-2-1 located on the first, second and third floors of Block D of the building and delineated green in the site plan attached to the agreement. '*Parcel*' has been defined by cl 31 of the agreement to mean '*one of the individual units comprised in the subdivided building which is to be held under separate strata title.*' No mention is made of the sale of any common property in the agreement although cl 31 also defines '*common property*' to be 'so much of the land as is not comprised in any parcel, (including any accessory parcel) or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, pipes, wires, cables and ducts and all other facilities and installations used or capable of being used or enjoyed in common by all purchasers.'

Reading the interpretations to be given to the property sold, it is clear that only three parcels or units of the shoplots or offices identified as D-G-1, D-1-1 and D-2-1 were sold, measuring 176.42, 228.07 and 247.12 sqm respectively as particularised by the preamble to the agreement. Clearly the three parcels do not include any common property and as such it is incorrect for the appellant to say that the respondent had given up possession of the common property with the sale of the three parcels. Since the respondent continued to retain possessory rights over the common property of the building even after the execution of the sale and purchase agreements it is my considered opinion that they can legally maintain a charge of trespass against the appellant and for that very reason this appeal is dismissed with costs, the orders of the learned judge are confirmed and the deposit be paid out to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar